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No. 95-1605

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner.

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ
AND MARIO PEREZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORLENIS HERNANDEZ-DIAZ' BRIEF
IN OPPOSITION
TO PETITION FOR CERTIORARI

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ORLENIS HERNANDEZ-DIAZ' BRIEF IN OPPOSITION

Respondent, Orlenis Hernandez-Diaz, through counsel, submits the following response in opposition to the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

SENTENCING GUIDELINES INVOLVED

United States Sentencing Commission Guidelines, (Nov. 1993) (hereinafter, "Sentencing Guidelines" or "Guidelines"), § 5G1.3(b), provides:

- (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

STATEMENT

Orlenis Hernandez-Diaz ("Hernandez") submits the following supplementary statement:

This case arose out of a "reverse sting" operation by the Albuquerque Police Department in early 1991. The sentences at issue here are all based on the same criminal conduct in April, 1991 leading to Hernandez' arrest on April 23, 1992.

After a trial by jury in state court, Hernandez was convicted of five substantive state offenses, four of which bore a firearm enhancement. On March 24, 1992 Hernandez was sentenced to twenty two years in the custody of the New Mexico Department of Corrections. Seven and one half years of the sentence were suspended, leaving fourteen and one half years to be served.

On May 8, 1992, Hernandez-Diaz was indicted in federal court for federal offenses

arising out of the same set of facts and the same firearms as the state convictions for which he was already serving time. On June 18, 1993, he was convicted of the federal charges of possession of less than fifty kilograms of marijuana, conspiracy to distribute less than fifty kilograms of marijuana and the use of a firearm during a drug transaction. (Doc. 103). On October 6, 1993, he was sentenced to sixty months on each of the possession and conspiracy charges. The district court ordered that the sentences for possession and conspiracy run concurrently with Hernandez' state sentence. However, it imposed a five-year firearm enhancement pursuant to 18 U.S.C. § 924(c) to run consecutively to his 14.5 year state sentence. (Doc. 125, TR at 683-84).

On appeal, the Tenth Circuit reversed the district court's consecutive imposition of the mandatory five-year firearm enhancement, ruling that the sentence could run concurrently with the previously imposed state sentence Hernandez had already begun to serve. It reasoned that where a literal reading of statutory language would produce an absurd result that is contrary to congressional intent, the courts can and should adopt a more sensible construction. The United States' petition for certiorari challenges this holding.

THE PETITION SHOULD BE DENIED

The United States argues that this Court should grant its petition to restore uniformity to an "important area of federal law."¹ It contends that the "plain language" of § 924(c) should control and that because the statute requires that a firearm enhancement shall not run concurrently with "any other term of imprisonment," its "plain language" must include a state

¹ Petition at p. 8.

sentence.⁷ Finally, it urges that "the result produced by the plain language of § 924(c) cannot fairly be labeled absurd."⁸ Because the Tenth Circuit's opinion was correct under the circumstances of this case, the United States' Petition should not be granted.

A. THE "PLAIN LANGUAGE" OF THE STATUTE DOES NOT REQUIRE A CONCLUSION THAT A FIREARM ENHANCEMENT RUN CONSECUTIVELY TO A STATE SENTENCE

18 U.S.C. § 924(c)(1) provides in pertinent part that:

Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

The United States argues that by the use of the term "any" in the last sentence, § 924(c) "manifests an intent" to reach both state and federal sentences.⁴ This "plain language," it contends, cannot be read to apply only to federal sentences.⁵

In so arguing, the United States ignores the operative fact on which the Tenth Circuit's holding was premised: Hernandez was **already** serving a state sentence for the **same conduct**

⁷ Petition at pp. 8-9.

⁸ Petition at p. 11.

⁴ Petition at p. 9.

⁵ Petition at p. 11.

when he was sentenced for the federal crimes. United States v. Gonzales, 65 F.3d 814, 819 (10th Cir. 1995). Under somewhat analogous circumstances, this Court has previously held that similar "plain language" in a federal statute did not apply to a detention by state officers on state charges, regardless of the apparent breadth of the language Congress chose to use.

In United States v. Alvarez-Sanchez, ___ U.S. ___, 114 S.Ct. 1599 (1994), this Court held that the delay between the defendant's arrest on state narcotics charges and his presentment to a federal magistrate on subsequent federal charges did not require the suppression of his inculpatory statement to federal agents made while he was in state custody on the state charges, despite the plain language of 18 U.S.C. § 3501(c), which provides that a confession made while a defendant is "under arrest or other detention in the custody of **any** law enforcement officer" is not inadmissible solely because of a delay in bringing that person before a federal magistrate. (emphasis added).

It explained:

We believe respondent errs in placing dispositive weight on the broad statutory reference to "any" law enforcement officer or agency without considering the rest of the statute. . . . there can be no "delay" in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place. Plainly, a duty to present a person to a federal magistrate does not arise until the person has been arrested for a federal offense. . . . Until a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer "empowered to commit persons charged with offenses against the laws of the United States," and therefore, no "delay" under Sec. 3501(c) can occur.

___ U.S. at ___, 114 S.Ct. at 1603-1604. Thus, to construe the word "any" as applicable to state officers who have detained the defendant on state charges would lead to an unworkable and

absurd result. Accordingly, it concluded that Congress must have intended the statute to apply only to federal charges despite its use of the phrase "any law enforcement officer." It could not have intended to reach a detention by state officers on state charges.

Likewise, in this case the Tenth Circuit properly concluded that the mechanical and literal application of the word "any" in § 924(c) would lead to an unworkable result.

As it observed, the Senate Report accompanying the 1984 amendment to § 924(c) directs that "the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense." S.Rep. No. 225, 98th Cong., 2d Sess. 313-14, reprinted in 1984 U.S. Code Cong. and Ad News, 3182, 3492 (quoted in 65 F.2d 814 at 821) (emphasis added).

Thus, because Hernandez was already serving a sentence imposed by a state court for convictions arising out of the same conduct, it simply would not have been possible for him to serve his mandatory sentence under § 924(c) "prior to the start of the sentence for the underlying or any other offense." *Id.* Under these circumstances, "any other term of imprisonment" could only mean any other federal term of imprisonment. The United States' attempt to place dispositive weight on the broad statutory reference to "any other term of imprisonment" without considering the context or purpose of the statute or its legislative history is erroneous. 114 S.Ct. at 1603. See, e.g., Public Citizen v. United States Dep't. of Justice, 491 U.S. 440, 454-55 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope"). Statutory language, however "plain," cannot be read in a vacuum. King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) ("The meaning of statutory language, plain or not, depends on context").

B. THE PETITION IGNORES SOLID PRINCIPLES OF STATUTORY CONSTRUCTION

As this Court has repeatedly held, where there is any ambiguity with respect to the application of a criminal statute, it must "resolve any doubt in favor of the defendant." Ratzlaff v. United States, ___ U.S. ___, 114 S.Ct. 655, 663 (1994), citing Hughey v. United States, 494 U.S. 152, 160 (1990) (principles of lenity "demand resolution of ambiguities in criminal statutes in favor of the defendant"). This Court has explicitly relied on this principle to resolve ambiguities in the application of 18 U.S.C. § 924(c) in favor of the defendant.

In Simpson v. United States, 435 U.S. 6 (1978), the defendants were convicted in federal court in two separate trials of two separate aggravated bank robberies and of using firearms to commit the robberies. The district court sentenced them to consecutive terms of imprisonment on the robbery and firearm counts under 18 U.S.C. § 2113(a) and (d) and 18 U.S.C. § 924(c).⁶ On appeal, the Sixth Circuit affirmed the imposition of consecutive firearm enhancement sentences under both statutes.

This Court granted certiorari to review whether §§ 2113(d) and 924(c) should be construed to authorize, in the case of a bank robbery committed with firearms, not only the imposition of the increased penalty under § 2113(d), but also the imposition of an additional consecutive penalty under § 924(c). It held that the statutes could not be so construed—despite their plain language. It reasoned that in a prosecution growing out of a single transaction of

⁶ At the time the petitioners were sentenced, the punishment for bank robbery under 18 U.S.C. § 2113(a) could be enhanced under § 2113(d) when the robbery is committed "by the use of a dangerous weapon or device." 18 U.S.C. § 924(c) provided that whoever "uses a firearm to commit any felony for which he may be prosecuted in a court of the United States," shall be subject to a penalty in addition to the punishment provided for the commission of such felony.

bank robbery with firearms, both the legislative history of § 924(c) and principles of lenity required a conclusion that a defendant could not be sentenced under both § 2113(d) and § 924(c). As it said, "... to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(d) would violate the established rule of construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 435 U.S. at 14-15 (quoting United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971) and citing Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-285 (1978)).

Reliance on the principle of lenity is critical where the legislative history of a criminal statute is sparse or equivocal. 435 U.S. at 15, quoting Ladner v. United States, 358 U.S. 169, 178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"). However, as the Tenth Circuit found in this case, the legislative history of the 1984 amendment to § 924(c), the version applicable here, makes it clear that Congress did not intend that the statutory firearm enhancement it requires could not be imposed concurrently to a state sentence that a defendant was already serving for the same conduct on which the federal sentence is based.

As it noted, the strongest indication of Congress' intent in enacting the 1984 amendment is found in the Senate Report that accompanied the 1984 amendment to § 924(c), which reads:

In either case, the defendant could not be given a suspended or probationary sentence, nor could any sentence under the revised subsection be made to run concurrently with that for the predicate crime or with that for any other offense. **In addition, the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the**

sentence for the underlying or any other offense.

S.Rep. No. 225, 98th Cong., 2d Sess. at 313-14, quoted at 65 F.3d 820) (emphasis added by the Tenth Circuit).

The Committee's instruction that the gun enhancement be served "prior to the start of the sentence for the underlying or any other offense," indicates that Congress did not intend the term "any other term of imprisonment" to apply to a sentence arising from a prior state prosecution under the circumstances here. In this case, Hernandez' federal sentence could not have been imposed prior to the start of his state sentence. Thus, the district court's consecutive imposition of the federal firearm enhancement was contrary to Congress' intent in enacting § 924(c).⁷

Additionally, as the Tenth Circuit explained, to apply the language of § 924(c) literally and as guided by the legislative intent set forth in the Committee Report would lead both to an absurd and an unreasonably harsh and unjust result. In order for Mr. Hernandez to serve the five year enhancement prior to his federal sentence but consecutively to his state sentence, he would serve first the 14.5 years imposed by the state, then his federal gun enhancement, and then the sentence imposed for his federal narcotics convictions. This would "more than double the custodial price that Congress and the Guidelines have set" for his crimes. 65 F.3d at 821.

In short, the decision of the Tenth Circuit plainly is not "insupportable under any mode

⁷ The Tenth Circuit appropriately reasoned that "[c]ommittee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history." 65 F.2d at 823, n.4. This reasoning finds abundant support in the decisions of this Court. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 43 n. 7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill") (citing Garcia v. United States, 469 U.S. 70, 76, and n. 3 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969)).

of statutory analysis heretofore endorsed by this Court.⁸ To the contrary, the decision of the Tenth Circuit that the § 924(c) enhancement may be served prior to the beginning of Hernandez' federal sentence and concurrently with his state sentence finds abundant support in very well-established principles repeatedly relied on by this Court.

C. THE SENTENCING GUIDELINES SUPPORT THE TENTH CIRCUIT'S HOLDING

Both the plain language of the Sentencing Guidelines and the Commentary to the Guidelines provide additional support for the Tenth Circuit's holding in this matter. In particular, § 5G1.3(b) applies where a defendant is prosecuted twice for the same underlying conduct and provides, in pertinent part, that where "the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." As the federal appellate courts have noted, "[t]he intended purpose of § 5G1.3(b) is to effectively credit for guidelines purposes defendants who have already served time--generally in another jurisdiction--for the same conduct or course of conduct." United States v. Johnson, 40 F.3d 1079, 1082 (10th Cir.1994) (quoting United States v. Flowers, 13 F.3d 395, 397 (11th Cir.1994)). Therefore, "[i]f the all-encompassing reading of Sec. 924(c) were adopted so that the gun-charge sentence would have to follow the service of the entire pre-existing state sentence and precede the federal sentence covering the identical conduct, § 5G1.3's concurrent sentencing scheme would be rendered nugatory." 65 F.2d at 822.

⁸ Petition at p. 8.

Again, such a result would clearly be contrary to Congressional intent in enacting the 1984 Sentencing Reform Act:

The Sentencing Reform Act of 1984, as amended . . . created the Sentencing Commission, 28 U.S.C. § 991(a), and charged it with the task of establishing sentencing policies and practices for the Federal criminal justice system. The Commission executed this function by promulgating the Guidelines Manual As we have observed, "the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in a criminal case."

Stinson v. United States, ___ U.S. ___, 113 S.Ct. 1913, 1916-1917 (1993) (quoting Mistretta v. United States, 488 U.S. 361, 391 (1989) (other citations omitted)).

Because the Guidelines are binding on the federal courts, those courts are required to harmonize, rather than negate, the provisions of the sentencing guidelines in their application of federal sentencing statutes. See, United States v. Shewmaker, 936 F.2d 1124, 1128 (10th Cir. 1991), citing United States v. Fossett, 881 F.2d 976, 980 (11th Cir. 1989).

Moreover, the Commentary to the Guidelines is likewise generally binding on the federal courts, as are the Policy Statements promulgated by the Commission.⁹ Stinson, ___ U.S. at ___, 113 S.Ct. at 1917. The Commentary to § 5G1.3 provides, in pertinent part, that:

Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of

⁹ The Policy Statement to § 5G1.3 provides:

In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Again, this policy underscores Congressional intent that neither the statutes nor the Guidelines be used to impose a total sentence well in excess of that set forth in the Guidelines.

imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

See, ¶ 5 of the Application Notes. This Commentary also authorizes the Tenth Circuit's adjustment of Hernandez' sentence so that it would not more than double the custodial price set for his crimes.

The United States' contention that Guidelines § 2K2.4 commands a different result is erroneous.¹⁰ § 2K2.4 requires only that the sentencing court sentence a defendant convicted of a § 924(c) violation for the five year term set forth in that statute. The Commentary to that section specifically prohibits "double counting" where a previous sentence was based in any part on the use of a firearm. Because Hernandez' state sentence incorporated firearm enhancements with respect to four out of the five state offenses of which he was convicted, the imposition of a consecutive federal firearm enhancement would subject him to an impermissible double penalty arising out of the same use of the same gun.

Moreover, the Commentary to § 2K2.4 also provides (with respect to upward departures) that a sentence should not exceed the maximum of the guideline range that would have resulted had there not been a § 924(c) conviction. Because to require that Hernandez' § 924(c) firearm enhancement run consecutively to his state sentence would more than double the sentence set by Congress and the Guidelines for his total criminal conduct, § 2K2.4 also supports the Tenth Circuit's result.

¹⁰ Petition at p. 11.

D. GRANTING THE PETITION IS NOT NECESSARY TO RESTORE UNIFORMITY TO AN "IMPORTANT AREA OF FEDERAL LAW"

The United States argues that this Court must resolve a split in the circuits and intervene to "restore uniformity to this important area of federal law."¹¹ Its argument is unavailing for two reasons. First, the question answered by the Tenth Circuit--"whether § 924(c)'s "mandatory five-year sentence may run concurrently with a previously imposed state sentence that a defendant **has already begun to serve**"--is narrow and limited to a set of unique facts that do not often arise. United States v. Gonzales, 65 F.3d at 819 (emphasis supplied by the court). Its holding will not have broad implications for an important area of federal law.

Second, the Tenth Circuit's holding was premised in large part on the excessive total sentence that resulted from requiring the federal firearm enhancement to run consecutively with Hernandez' state sentence. As discussed above, the total sentence imposed on Mr. Hernandez by the district court's "literal" application of § 924(c) far exceeded the maximum possible under the Guidelines for the same criminal conduct. This result was contrary to the clear mandate of both the Guidelines and the Commentary to the Guidelines, and required reversal for that reason alone. Not only is this not a situation likely to be repeated with great frequency, but the appellate court was required to correct the conflict under these circumstances and properly did so.

¹¹ Petition at p. 8.

CONCLUSION

For the foregoing reasons, this Court should deny the United States' Petition for a Writ of Certiorari.

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